

## Occupational Disease Evaluations

The Workers' Compensation Claims Assistance Bureau of the ERD is responsible for the occupational disease (OD) evaluation process. The process is used to determine whether a claimant's condition is a result of the employment and to determine compensability of claims under the OD statutes when an insurer has not accepted liability for the claim.

The process requires the claimant to attend a medical evaluation directed by the department. The medical evaluator submits a report of findings to the department. A copy of the report is then sent to the claimant and the insurer. If a dispute still exists over initial compensability as an OD, it is a dispute subject to the jurisdiction of the Workers' Compensation Court.

### Exhibit 4.1

#### Occupational Disease Cases By Plan Type<sup>1</sup> and Fiscal Year of Evaluation Request

Plan Types	FY01	FY02	FY03	FY04	FY05
Plan 1	40	29	30	25	38
Plan 2	82	63	64	28	54
Plan 3	45	81	96	71	101
<b>Total</b>	<b>167</b>	<b>173</b>	<b>190</b>	<b>124</b>	<b>193</b>

**Notes:**

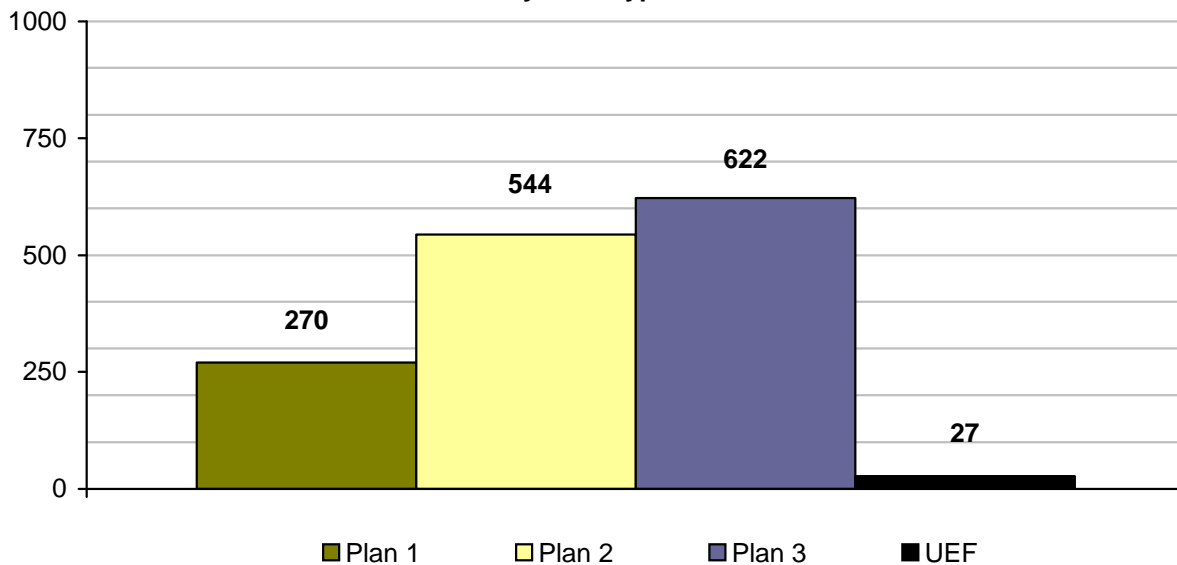
<sup>1</sup>Plan types: Plan 1 – Self-Insured Employers, Plan 2 – Private Insurance and Plan 3 – Montana State Fund



## Mediation

The Workers' Compensation Mediation Unit of the ERD administers a mandatory process for resolving disputes dealing with benefits for both occupational injury and occupational disease claims. The mediation process is confidential, non-binding and informal. The mediator facilitates the exchange of information between the parties and assists with solutions aimed at resolving the dispute. Conferences are held either in person in Helena or by telephone. Often more than one conference is held in order to resolve the disputes on a claim. In FY05, the Mediation Unit received and processed 1,338 petitions, which involved 1,463 claims. A petition is a request for mediation and may include multiple claims.

**Exhibit 4.2**  
**Claims in Mediation - FY05**  
**By Plan Type<sup>1</sup>**



**Exhibit 4.3**  
**Claims in Mediation**  
**By Plan Type<sup>1</sup> and Fiscal Year of Receipt**

Plan Types	FY01		FY02		FY03		FY04		FY05	
	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent
Plan 1	227	17%	247	18%	244	18%	272	19%	270	18%
Plan 2	648	49%	680	49%	623	46%	578	41%	544	37%
Plan 3	428	32%	443	32%	452	33%	550	39%	622	43%
UEF	30	2%	27	2%	36	3%	16	1%	27	2%
<b>Totals<sup>2</sup></b>	<b>1,333</b>	<b>100%</b>	<b>1,397</b>	<b>100%</b>	<b>1,355</b>	<b>100%</b>	<b>1,416</b>	<b>100%</b>	<b>1,463</b>	<b>100%</b>

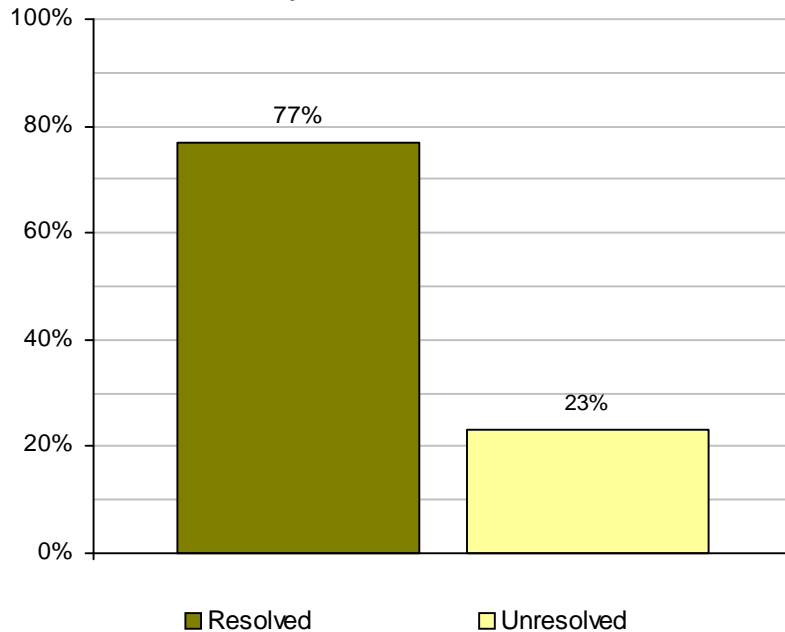
**Notes:**

<sup>1</sup>Plan types: Plan 1 – Self-Insured Employers, Plan 2 – Private Insurance, Plan 3 – Montana State Fund and UEF – Uninsured Employers Fund

<sup>2</sup>Total count represents number of claims not number of petitions

**Exhibit 4.4**

**Percent of Petitions Resolved  
By Mediation - FY05**



- Over the past five years, the Mediation process has had an average resolution rate of 78%.
- From the date of the petition receipt to issuing a written recommendation, the average completion time for mediation was 41 days in FY05.

**Exhibit 4.5**

**Mediation Petitions<sup>1</sup>  
By Fiscal Year of Receipt**

Petitions Received	FY01		FY02		FY03		FY04		FY05	
	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent
Pending <sup>2</sup>	0	0%	1	1%	1	1%	14	1%	130	10%
Closed	1,195	100%	1,259	99%	1,231	99%	1,289	99%	1,208	90%
<b>Total Petitions Received</b>	<b>1,195</b>	<b>100%</b>	<b>1,260</b>	<b>100%</b>	<b>1,232</b>	<b>100%</b>	<b>1,303</b>	<b>100%</b>	<b>1,338</b>	<b>100%</b>
Resolved	966	81%	972	77%	974	79%	989	77%	927	77%
Unresolved	229	19%	287	23%	257	21%	300	23%	281	23%
<b>Total Petitions Closed</b>	<b>1,195</b>	<b>100%</b>	<b>1,259</b>	<b>100%</b>	<b>1,231</b>	<b>100%</b>	<b>1,289</b>	<b>100%</b>	<b>1,208</b>	<b>100%</b>

**Notes:**

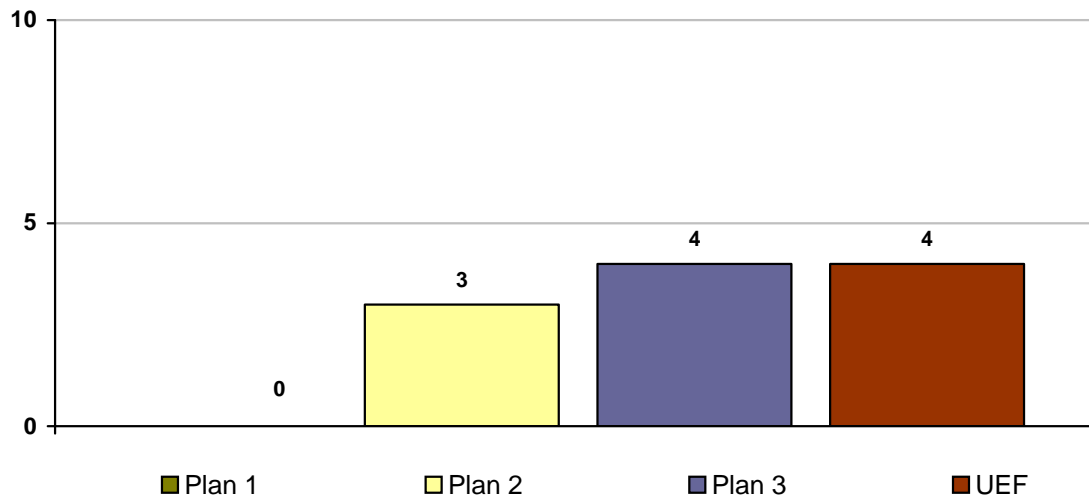
<sup>1</sup>A single petition may include multiple claims and/or multiple insurers.

<sup>2</sup>Eventual outcome of pending petitions will affect percent resolved.

## Contested Case Hearings

The DLI Hearings Bureau holds contested case hearings. Disputes heard at contested case hearings include appeals from orders and determinations issued by ERD, assessments of penalties for uninsured employers, medical disputes between providers and insurers when payments to the claimant are not an issue and regulation of attorney fees. The numbers of cases being heard by the DLI Hearings Bureau has been declining since FY98, when the Legislature transferred responsibility for hearing occupational disease claims to the Workers' Compensation Court. In FY05, the Hearings Bureau received 11 new requests for contested case hearings.

**Exhibit 4.6**  
**Petitions Received by the Hearings Bureau- FY05**  
**By Plan Type<sup>1</sup>**



**Exhibit 4.7**  
**Petitions Received by the Hearings Bureau**  
**By Plan Type<sup>1</sup> and Fiscal Year**

Plan Type	FY01		FY02		FY03		FY04		FY05	
	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent
Plan 1	0	0%	0	0%	1	5%	0	0%	0	0%
Plan 2	12	63%	7	44%	6	32%	5	36%	3	28%
Plan 3	1	5%	2	13%	3	16%	7	50%	4	36%
UEF	6	32%	6	38%	9	47%	2	14%	4	36%
PEO	0	0%	1	6%	0	0%	0	0%	0	0%
<b>Total</b>	<b>19</b>	<b>100%</b>	<b>16</b>	<b>100%</b>	<b>19</b>	<b>100%</b>	<b>14</b>	<b>100%</b>	<b>11</b>	<b>100%</b>

**Notes:**

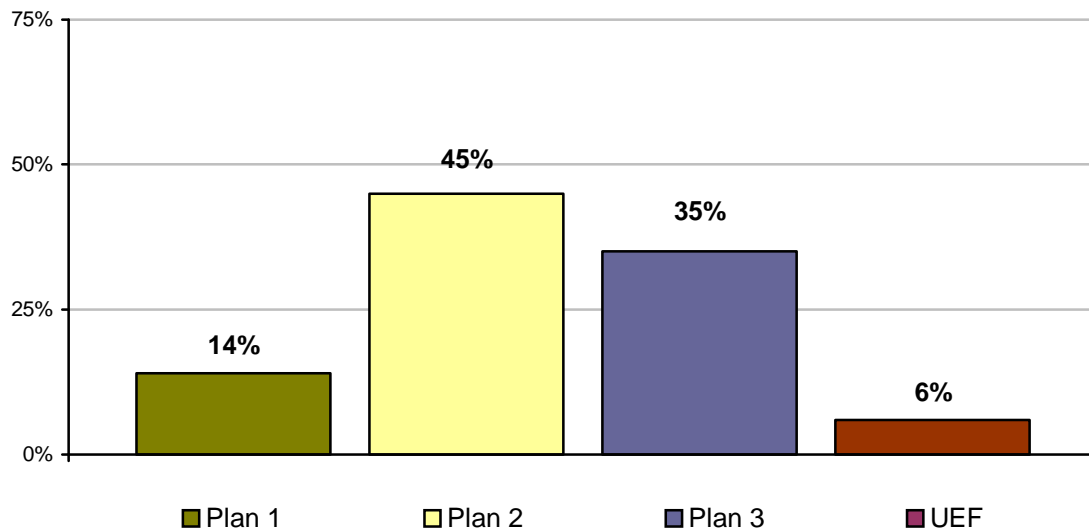
<sup>1</sup>Plan types: Plan 1 – Self-Insured Employers, Plan 2 – Private Insurance, Plan 3 – Montana State Fund, UEF – Uninsured Employers Fund and PEO – Professional Employer Organization.

## Workers' Compensation Court

The Workers' Compensation Court (WCC) resolves disputes between insurers or employers and workers disabled as a result of occupational injuries or diseases. The Court has original jurisdiction over benefit issues arising under the Workers' Compensation Act and the Occupational Disease Act. For an injury occurring after July 01, 1987, disputes must first be mediated. The Court's exclusive jurisdiction also extends to disputes involving independent contractor exemptions under both the Workers' Compensation and Unemployment Insurance Acts, enforcement of DLI subpoenas, civil penalties for violations of workers' compensation provisions and the two-year return to work preference specified in section 39-71-317(2), MCA.

Court statistics were taken from the Workers' Compensation Court Website: <http://wcc.dli.mt.gov>

**Exhibit 4.8**  
**Percent of Petitions Received by the WCC - FY05**  
**By Plan Type<sup>1</sup>**



**Exhibit 4.9**  
**Petitions Received by the WCC**  
**By Plan Type<sup>1</sup> and Fiscal Year**

Plan Type	FY01		FY02		FY03		FY04		FY05	
	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent
Plan 1	14	6%	29	12%	34	14%	28	11%	40	14%
Plan 2	144	60%	140	56%	139	59%	144	55%	124	45%
Plan 3	65	27%	62	25%	53	22%	75	29%	96	35%
UEF	15	6%	16	6%	9	4%	14	5%	18	6%
<b>Total by Plan<sup>2</sup></b>	<b>238</b>	<b>99%<sup>3</sup></b>	<b>247</b>	<b>100%</b>	<b>235</b>	<b>100%</b>	<b>261</b>	<b>100%</b>	<b>278</b>	<b>100%</b>

**Notes:**

<sup>1</sup>Plan types: Plan 1 – Self-Insured Employers, Plan 2 – Private Insurance, Plan 3 – Montana State Fund, SIF – Subsequent Injury Fund and UEF – Uninsured Employers Fund

<sup>2</sup>Petitions may involve more than one plan type.

<sup>3</sup>Columns may not sum 100% due to rounding.

**Exhibit 4.10**  
**Decisions by the WCC**  
**By Fiscal Year**

<b>Decisions</b>	<b>FY01</b>	<b>FY02</b>	<b>FY03</b>	<b>FY04</b>	<b>FY05</b>
Telephone Conference Resulting in Disposition	0	3	0	0	0
Bench Rulings without Written Decisions	3	2	0	1	3
Decisions	90	103	145	158	161
Orders on Appeal	0	4	0	0	1
Substantive Orders	64	26	32	30	41
Attorney Fee Orders	7	0	5	7	2
Orders on Cost	4	14	15	4	2
Disposed of by Telephonic Conference	0	2	0	0	0
<b>Subtotals</b>	<b>167</b>	<b>152</b>	<b>197</b>	<b>200</b>	<b>210</b>
Petitions Dismissed by Agreement	136	118	72	88	83
<b>Totals</b>	<b>303</b>	<b>270</b>	<b>269</b>	<b>288</b>	<b>293</b>

**Exhibit 4.11**  
**Full and Final Compromise Settlements by the WCC**  
**By Plan Type<sup>1</sup> and Fiscal Year**

<b>Plan Type</b>	<b>FY01</b>	<b>FY02</b>	<b>FY03</b>	<b>FY04</b>	<b>FY05</b>
Plan 1 Self-Insured	5	5	5	7	1
Plan 2 Private Insurers	23	16	12	13	6
Plan 3 State Compensation Ins. Fund	41	24	24	17	10
Plan 4 Subsequent Injury Fund	0	0	0	0	0
Plan 5 Uninsured Employers Fund	0	0	0	0	0
<b>Total</b>	<b>69</b>	<b>45</b>	<b>41</b>	<b>37</b>	<b>17</b>

**Note:**

<sup>1</sup>Plan types: Plan 1 – Self-insured Employers, Plan 2 – Private Insurance, Plan 3 – Montana State Fund, SIF – Subsequent Injury Fund and UEF – Uninsured Employers Fund

## **Significant Workers' Compensation Court Cases**

Case summaries are taken from the Workers' Compensation Court Website: <http://wcc.dli.mt.gov>

### **CATHERINE E. SATTERLEE vs. LUMBERMAN'S MUTUAL CASUALTY COMPANY 2005 MTWCC 55**

**Summary:** The petitioners filed a motion for partial summary judgment seeking to have this Court declare section 39-71-710, MCA1, as it applies to permanent total disability benefits, unconstitutional under the equal protection clause found in Mont. Const., Art. II, § 4. The petitioners also moved for partial summary judgment upon the grounds that section 39-71-710, MCA, unlawfully delegated legislative power to the federal government.

**Held:** Partial summary judgment is denied. Section 39-71-710, MCA, is constitutional as applied to PTD benefits. There is no violation of Petitioners' right to equal protection. A rational basis exists to justify the disparate treatment of similarly situated classes. Furthermore, there is no unlawful delegation of legislative power.

### **GALE MILLER vs. SEARS 2005 MTWCC 54**

**Summary:** The petitioner petitioned for a lump-sum conversion of his lifetime expectancy of permanent total disability benefits.

**Held:** Conversion of lifetime permanent total disability benefits to a lump sum is granted. The petitioner demonstrated financial need that relates to the necessities of life. The petitioner and his wife provide a home for themselves, two of their adult children, and his elderly, disabled mother. The petitioner and his family currently reside in a multilevel rental home that is difficult for both the petitioner and his mother to navigate because of the stairs. The petitioner and his wife demonstrated that a lump sum would enable them to build or buy and modify a home which would accommodate the petitioner's and his mother's disabilities. The petitioner, with the assistance of his wife, is competent to handle his financial affairs. The petitioner and his wife have thus far managed their financial affairs with limited resources and setbacks beyond their control. However, it is apparent from the testimony that the petitioner and his wife's ability to manage their resources is being heavily taxed by their need to borrow against the petitioner's wife's retirement plan and that their ability to continue to borrow against this retirement plan is nearly exhausted.

### **LEE N. THOMPSON, DARIN SHARP and SCOTT BAILEY vs. STATE OF MONTANA, LIBERTY NORTHWEST INSURANCE CORPORATION and MONTANA STATE FUND 2005 MTWCC 53**

**Summary:** Petitioners filed an action for declaratory judgment seeking to have this Court declare subsection (3) of section 39-71-604, MCA (2003), and subsection (5) of section 50-16-527, MCA (2003), unconstitutional as violative of Mont. Const., Art. II, §§ 10 and 17, and/or the Fifth and Fourteenth Amendments to the United States Constitution. Petitioners subsequently filed motions for summary judgment on these issues.

**Held:** Summary judgment is granted. Section 39-71-604(3), MCA (2003), and section 50-16-527(5), MCA (2003), violate the petitioners' constitutional right of privacy as guaranteed by Mont. Const., Art. II, § 10, and no compelling state interest exists to justify such violation. Moreover, the Court also finds that sections 39-71-604(3) and 50-16-527(5), MCA (2003), violate the petitioners' constitutional right to due process as guaranteed by Mont. Const., Art. II, § 17, and no rational basis exist to justify such violation.

**LARRY McELDERRY**  
**vs.**  
**ST. PAUL FIRE & MARINE INSURANCE COMPANY**  
**2005 MTWCG 26**

**Summary:** Following a settlement conference with the settlement master of the Workers' Compensation Court, the claimant, who was personally present during the conference and also represented by counsel, repudiated a putative settlement agreement reached during the conference. The matter was then transferred to District Court Judge Jeffrey M. Sherlock for a determination as to whether a binding settlement had been reached.

**Held:** The claimant agreed to a binding and enforceable settlement agreement during the settlement conference.

**KORMAN MARKETING GROUP**  
**vs.**  
**INDEPENDENT CONTRACTOR CENTRAL UNIT**  
**2005 MTWCC 24**

**Summary:** Icefox (his real name), a dogsled racer who had previously operated a business offering dogsled rides, bid and entered into a contract to provide dogsled races to guests of the operator of a guest ranch. The first contract was for the winter of 2001-2002. Icefox requested and received advances so he could purchase dogs and equipment. He in fact purchased the necessary dogs and equipment, laid out the specific dogsled routes on Ranch property, employed and paid others to assist him, supervised and operated the rides, and made safety decisions. He entered into a second contract for a second season, again specifying a price to which the Ranch then agreed. He did not enter into a contract for a third season and then sought unemployment benefits. The Ranch objected to his claim on the ground that he was an independent contractor and the matter was referred to the Independent Contractor Central Unit of the Montana Department of Labor and Industry, which is responsible for making an initial determination as to whether a worker is or is not an independent contractor. Following an ICCU decision, the Ranch filed a petition with the Workers' Compensation Court seeking a final determination of Icefox's status.

**Held:** Icefox was an independent contractor.



**MOLLIE R. TELLES,**  
**TRAVELERS PROPERTY & CASUALTY COMPANY OF AMERICA**  
**vs.**  
**ROYAL INSURANCE COMPANY OF AMERICA**  
**2005 MTWCC 21**

**Summary:** The claimant developed carpal tunnel syndrome as a result of her employment but was not diagnosed with the condition until after her employment had ended. The employer's insurer at the time she was diagnosed accepted liability for her carpal tunnel syndrome claim under a reservation of rights, then petitioned the Court for indemnification from the insurer which insured the employer during the period of the claimant's employment.

**Held:** An insurer which insures an employer after the claimant ceased working for the employer is not liable for an occupational disease arising during the employment. Section 39-72-303, MCA (2001-2003), which governs liability as between two insurers insuring a single employer, applies only where both insurers provided coverage while the claimant was actually employed by the employer.

**STEVEN L. REDMOND**  
**vs.**  
**MONTANA STATE FUND**  
**2005 MTWCC 20**

**Summary:** The claimant filed a claim for osteoarthritis of his toes in 1993 and his claim was accepted as an occupational disease. Thereafter, his osteoarthritis progressed to other parts of his body. The insurer denied liability with respect to the progression and urges that the claimant was required to file a new claim for each new body part affected and that his claims for other body parts are barred by the statute of limitations.

**Held:** The 1993 claim was for the disease of osteoarthritis and encompasses any progression of that disease. The claimant was not required to file new claims with respect to other parts of the body subsequently affected by the disease.

**DAVID STEWART**  
**vs.**  
**ATLANTIC RICHFIELD COMPANY**  
**2005 MTWCC 17**

**Summary:** The claimant suffered a hearing loss due to workplace noise while working for The Anaconda Company. He retired from the Company in 1984 and was provided a hearing aid pursuant to a collective bargaining agreement between the Company and his union but never filed or pursued a claim for workers' compensation or occupational disease benefits until 2002, when he brought his present petition.

**Held:** The claimant's only potential entitlement is under the Occupational Disease Act. Under that Act, his claim is barred by section 39-72-403(3), MCA (1983), which is a statute of repose and is not subject to tolling for any reason.

**TYAD, INCORPORATED, A MONTANA CORPORATION, d/b/a  
THE PLAYGROUND LOUNGE AND CASINO  
vs.  
INDEPENDENT CONTRACTOR CENTRAL UNIT  
2005 MTWCC 16**

**Summary:** Five exotic dancers filed wage claims against the establishment where they danced. The claims were referred to the Independent Contractor Central Unit (ICCU) of the Department of Labor and Industry for a determination as to whether they were employees or independent contractors. After the ICCU determined they were employees, the establishment petitioned the Workers' Compensation Court for a *de novo* determination.

**Held:** (1) Under a 2001 amendment to the Workers' Compensation Act, the Workers' Compensation Court has jurisdiction over independent contractor disputes involving not only workers' compensation and unemployment insurance issues but also those involving wage claims. § 39-71-415(3), MCA (2001-2003). (2) Where a strip club controls the daily times dancers perform, provides significant equipment and services essential to the dancers performing, and can terminate dancers at any time without liability simply by giving written notice, the dancers are employees, not independent contractors.

**JONATHAN LION  
vs.  
MONTANA STATE FUND  
2005 MTWCC 11**

**Summary:** The claimant successfully completed a rehabilitation plan calling for flight training leading to his certification as a flight instructor and air carrier pilot. When he could not find employment as a pilot, he petitioned the Court for further rehabilitation benefits amounting to approximately \$200,000 to allow him to gain more flying time so he could primarily seek flying contracts with the State of Montana and United States Forest Service.

**Held:** The request for additional benefits under section 39-71-2001, MCA (1991), is denied since (1) only one rehabilitation plan is allowed and the original plan was completed; (2) the additional benefits would exceed the 104-week limitation imposed by the section; (3) the new plan has not been certified as reasonable by any vocational provider; and (4) the claimant has not proven to the satisfaction of the Court that the new plan would result in a reasonable prospect of regular employment. Any one of the grounds is a sufficient basis for denial.

**JANNA WEISGERBER  
vs.  
AMERICAN HOME ASSURANCE COMPANY  
2005 MTWCC 8**

**Summary:** The claimant seeks permanent total disability benefits on account of an occupational disease arising out of her exposure to hair dye and other aerosolized chemicals at her workplace. The claimant's primary and most significant problem is vocal cord dysfunction where her vocal cords go into spasm and constrict her breathing.

**Held:** The claimant's employability must take into account her preexisting disabilities at the time her occupational disease arose. Under section 39-71-609(2), MCA (2001), upon the claimant reaching maximum medical improvement and the insurer's termination of temporary total

disability benefits, the insurer has the burden of producing evidence that, taking into consideration not only the claimant's disability directly attributable to her occupational disease but also other disabilities existing at the time her occupational disease arose, the claimant is qualified for and physically capable of performing regular work. The failure of the insurer to do so, along with evidence tending to indicate that the claimant is not able to do the jobs identified by the insurer, requires the Court to find the claimant to be permanently totally disabled.

**ROBERT PURKEY**  
**vs.**  
**AIG and LIBERTY MUTUAL FIRE INSURANCE COMPANY**  
**2005 MTWCC 2**

**Summary:** The claimant suffered a low-back injury in 2002 for which AIG was liable. He reached maximum medical improvement with respect to the injury and returned to his time of-injury job on September 15, 2003. Shortly thereafter, he suffered a second, work-related aggravation of his low-back condition. Liberty Mutual was the insurer at the time but denied his claim for benefits because it was informed the claimant had failed to give his employer timely notice of the 2003 aggravation. The claimant then petitioned the Workers' Compensation Court seeking a determination that Liberty Mutual is liable for the aggravation and also seeking further temporary total disability benefits from AIG for an additional six-month period on account of its alleged failure to comply with section 39-71- 609, MCA (2003), when converting his 2002 injury benefits from temporary total to permanent partial benefits.

**Held:** (1) The claimant did not notify his employer of his 2003 aggravation within thirty days as required by section 39-71-603, MCA (2003), therefore, Liberty Mutual Fire Insurance Company is not liable for the aggravation. (2) AIG complied with the requirements of section 39-71-609, MCA (2003), when converting the claimant's benefits from temporary total to permanent total. Even if it did not comply with the statute, the claimant's return to work two weeks later terminated his entitlement to any further temporary total disability benefits.

## **Selected Supreme Court Decisions on Workers' Compensation and Occupational Disease**

These decisions can be found at the State Law Library Website: [www.lawlibrary.state.mt.us](http://www.lawlibrary.state.mt.us)

### **RUBEN FELLEBERG vs. TRANSPORTATION INSURANCE COMPANY 2005 MT 90**

**Summary:** The WCC found that, while still capable of working, Fellenberg voluntarily retired from Grace in 1986, for reasons unrelated to his occupational asbestos disease. The court further found that Fellenberg has not worked since his retirement and that at the time of his retirement, he had no intention of returning to the work force. Fellenberg does not dispute these findings. The WCC concluded that, as a result of his voluntary withdrawal from the labor force in 1986, Fellenberg was not entitled to PTD benefits because he did not meet the statutory requisites for such benefits. Specifically, the court concluded Fellenberg had no "loss of actual earnings" or loss of "earning capability" as a result of his occupational disease; rather, his "loss of actual earnings" was the result of his voluntary retirement. Furthermore, while finding that Fellenberg suffered a sixty percent loss of earning capability, the WCC concluded that such a reduction in earning capability was not compensable because he had voluntarily retired at 62, and at age 79, did not work and did not intend to work. The WCC also concluded that under the 1983 version of § 39-71-710, MCA, Fellenberg would not be entitled to PTD benefits at any future time because he receives social security retirement benefits. Having determined that Fellenberg was not entitled to PTD benefits, the WCC concluded that Fellenberg likewise did not qualify for PPD benefits, pursuant to *Hunter*. The Court also concluded that Fellenberg was not entitled to an impairment award. Lastly, the WCC considered Fellenberg's constitutional challenges to two of the four statutes in question and held that the statutes were constitutional.

**Held:** The Supreme Court affirmed the Workers' Compensation Court decision.

### **KEVIN RAUSCH, CHARLES FISCH, AND THOMAS FROST vs. STATE COMPENSATION INSURANCE FUND 2005 MT 140**

**Summary:** Kevin Rausch, Charles Fisch and Thomas Frost (Appellants) appeal from the judgment entered in the Workers' Compensation Court, holding that permanently totally disabled (PTD) claimants injured between July 1, 1987, and June 30, 1991, are not entitled to an impairment award, and denying Appellants' request to issue a subpoena compelling the Department of Labor and Industry to furnish information identifying PTD claimants covered by Plan 1 and Plan 2 insurers. Additionally, Appellants argue that denial of an impairment award to PTD claimants violates the equal protection clause.

**Held:** The Supreme Court affirmed the Workers' Compensation Court decision.

**CASSANDRA M. SCHMILL**  
**vs.**  
**LIBERTY NORTHWEST INSURANCE CORPORATION**  
**2005 MT 144**

**Summary:** Previously the Supreme Court found 39-72-706, MCA to be in violation of the Equal Protection Clauses of both the United States and Montana Constitutions. The Workers' Compensation Court had held that Schmill I applies retroactively and the petitioner's attorney were entitled to common fund fees even though they did not request them in their initial petition.

**Held:** The Supreme Court affirmed the Workers' Compensation decision that Schmill I applies retroactively and the petitioner's attorney is entitled to common fund fees.